(19,257.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 200.

R. R. DUNBAR, ELIZABETH DUNBAR, GEORGE WASHINGTON, ET AL., PLAINTIFFS IN ERROR,

vs.

LUCRETIA L. GREEN, WILLIAM E. GREEN, EFFIE GREEN, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 27, 1905.

In the Supreme Court of the United States, October Term, 1904.

R. R. DUNBAR, ELIZABETH DUNBAR, GEORGE WASHINGTON, *et al.*, Plaintiffs in Error,
vs.
LUCRETIA L. GREEN ET AL., Defendants in Error. } No. 200.

Stipulation.

It is hereby stipulated and agreed by and between the plaintiffs in error and the defendants in error, in the above entitled cause, that pages 65 to 83 inclusive of the record herein be printed, same being petition for rehearing and order denying the same, citation and service, writ of error, assignment of errors, clerk's certificate to transcript and return to writ of error, the same having been omitted by mistake of counsel, in the prior stipulation filed herein.

L. F. BIRD,
Of Counsel for Plaintiffs in Error.
C. F. HUTCHINGS,
Of Counsel for Defendants in Error.

[Endorsed:] File No. 19,257. Supreme Court U. S. October term, 1904. Term No. 200. R. R. Dunbar *et al.*, pl'ffs in error, *vs.* Lucretia L. Green *et al.* Stipulation to print additional parts of record. Filed Mar 2d, 1905.

And afterwards on the 1st. day of May A. D. 1903, there was filed in the office of the clerk of the supreme court of the State of Kansas, a petition for a rehearing which with the endorsements thereon is in words and figures following, to-wit:

In the Supreme Court of the State of Kansas.

R. R. DUNBAR ET AL., Plaintiffs in Error,
vs.
SANFORD M. GREEN ET AL., Defendants in Error. } No. 13005.

Petition for Rehearing.

Come now here the said plaintiffs in error, and show to the court that they are entitled to an order for a rehearing herein for the following reasons, to-wit:

The decision of the court is based upon a misconception of the facts of the case.

The court, in deciding this case assumes

(1.) That Jonathan Gore, as guardian of George Washington, sold the land in controversy to Joel F. Kinney *under the authority of the probate court of Johnson county, Kansas.*

(2.) That George Washington took no steps to challenge the validity of the guardian's deed to Joel F. Kinney until June 25, 1895, when, according to the agreed statement of facts, R. R. Dunbar took possession of the land as agent of George Washington, and

(3.) That it *was virtually conceded* that if George Washington was an ordinary litigant inaction on his part for over 21 years would constitute an effective bar to an assertion of a claim to the land, regardless of any statute of limitations.

Now the facts are that the deed from Jonathan Gore, guardian, to Joel F. Kinney, was not made under the *authority* of any court, but was made on October 14, 1868, which was about 5 months before the guardian petitioned the probate court for authority to sell the land. This is all set out and shown in the brief of the plaintiffs in error (pp. 6 and 7, paragraphs 8 and 10; p. 11, paragraph 7; p. 13, paragraph 3; p. 15, paragraph (*b*)).

The deed being absolutely and incurably void, no affirmative action on the part of George Washington was necessary to set it aside. Being a void, as distinguished from a merely voidable deed, it was, in effect, no deed at all, and being no deed at all no rights were directed by it, and no rights could be acquired by it. It was not binding on George Washington, nor did it bar him from any interest in the property. No action on the part of the defendants in error, *no inaction on the part of the plaintiff in error, George Washington,* no resulting equity in the hands of third persons, and more than all, no power residing in any legislative *or other department of the Government,* could invest it with any of the elements of juridical vitality.

The guardian's deed was made before the statute was enacted making guardian's deeds *prima facie* evidence of the regularity of the proceedings (act of 1883 amending sec. 18 guardian and ward act), and no presumptions are to be indulged in favor of the validity of the guardian's deed, or the regularity of the probate proceedings (Brief Plaintiffs in Error p. 16).

The deed being an absolutely void guardian's deed there was no necessity for any action to set it aside or have it canceled, and it was impotent to start any statute of limitations in its favor (Brief of Plaintiffs in Error p. 29), and the approval of such deed by the Secretary of the Interior did not have the effect of giving vitality to such absolutely void deed (Brief of Plaintiffs in Error pp. 16 and 17).

Such being the case there was no necessity of affirmative action by George Washington to set aside such void guardian's deed, and he could wait until his title was attacked, or some move was made by parties claiming under such deed to establish their title under it and that was just what he did in this case. George Washington is not the actor in this case. He did not begin this suit. He was attacked. The defendants in error, as the plaintiffs in the court below, brought eject-

ment against him, as they prevailed in that suit. The case was tried on an agreed statement of facts, and George Washington lost, and the defendants in error won. Now the defendants in error must have won *on the strength of their title* and not on the weakness of the title of George Washington, but the court, in its decision seems to have overlooked this point in its consideration of the case, and view George Washington as the actor, and put upon him, although he was in the possession of the property, and the defendants never were in the possession of it, the burden of showing the strength of his title or of failing to hold his possession, when the law is that being in possession, he was entitled to hold such possession until the defendants in error showed a title, and consequent right to the possession as the holder of such title.

By the agreed statement of facts it is shown that George Washington had been in the possession of the property for about 5 years before this suit was brought, and that prior to that time the land was vacant and unimproved (Brief of Plaintiffs in Error p. 7, paragraph 11). The land being vacant and unimproved the constructive possession followed the legal title,—the title of George Washington. It could not follow the title of the defendants in error for the constructive possession can never follow a title based on a void deed. To say that it would is equivalent to holding that constructive possession follows the last deed, whether void or not, which no court has ever yet decided.

We think the court has confounded this case with cases where purchasers under *voidable deeds* have taken possession of property and *improved it*, and thereby got a standing, in equity, as to such property, or where by color of title and possession for 15 years the adverse fee title has been extinguished, but that is not the case. Here, *by the agreed statement of facts*, we have only an absolutely void deed, and nothing more—no possession, no improvements, no payment of taxes.

The court is equally in error in assuming that *it was virtually conceded* that if George Washington was an ordinary litigant he would be barred.

It is true that the fact that George Washington was a tribal Indian, and as such was not affected by any laws of the State was urged on the argument, but the point was distinctly made that George Washington would be entitled to judgment herein if he had, at all times been *a white boy*.

On pages 28 and 29 of our brief we stated:

"But we do not think it is necessary to go into the examination of the *Indian title* in this case, for the guardian's deed is absolutely void—would be void if George Washington had, at all times, been a white boy, and not a Shawnee Indian, and no question of the statute of limitations can enter into this case, as under the agreed statement of facts, George Washington, the defendant, and R. R. Dunbar, his agent, have been in the possession of the property for

more than five years, and there is no pretense that the plaintiffs, or their grantors, were ever in the possession of the property.

"A void deed is a nullity and has no real existence, and there is no necessity for any action to set it aside or have it cancelled, and it is impotent to start the statute of limitations in its favor.

Waterson vs. Devoe, 18 Ks. 223;
Hall vs. Dodge, 18 Ks. 277;
Higginbotham, 9 Ks. 328;
McGee vs. Thomas, 9 Ks. 343;
Rogers vs. Clemmans, 27 Ks. 522.

"In regard to the point that the defendant, George Washington, is estopped from denying the validity of the deed made by his pretended guardian because he received some of the money derived from the sale of the land, we would state the money was received by the defendant, if at all, while he was a minor, and aside from the fact that he could not be estopped, because he is a Shawnee Indian, he would not be estopped if he had been a white boy, by receiving the money while he was still a minor."

Respectfully submitted,

BIRD & POPE,
Attorneys for Plaintiffs in Error.

Kansas City, Mo., April 30, 1903.

[Endorsed:] No. 13,005. R. R. Dunbar *et al.*, plaintiffs in error, vs. Sanford M. Green *et al.*, defendants in error. Petition for rehearing. Filed May 1, 1903. D. A. Valentine, clerk supreme court. Bird & Pope, att'ys for pl'ffs in error.

And be it further remembered, that on the 9th day of May 1903 the same being one of the regular judicial days of the January 1903 term of the supreme court of the State of Kansas, said court being in session at its court room in the city of Topeka, there being present the chief justice, and the six other justices heretofore last mentioned, the following proceeding was had and remains of record to-wit:—

R. R. DUNBAR, Pl'ff in Error,
vs.
SANFORD M. GREEN, Def't in Error.
} No. 13005.

Journal Entry Overruling Petition for Rehearing.

Now comes on for decision the petition for a re-hearing of this cause. And thereupon it is *ordered* that said petition be denied.

And afterwards on the 25th. day of January A. D. 1904, there was filed in the office of the clerk of the supreme court of the State of Kansas a citation, which, with the acknowledgement of the service of the same and the endorsements thereon is in words and figures following to-wit:—

UNITED STATES OF AMERICA, ss:

To Lucretia L. Green, William E. Green, Effie Green, Lina Hill, Fannie E. McHale, and Lottie De Wit:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Kansas, in a cause wherein R. R. Dunbar, Elizabeth Dunbar, George Washington, Allen F. Reed, Al. Payne, T. H. Payne, John Small and George Dunbar, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22d day of January, A. D. 1904.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of the
State of Kansas.

Service of the foregoing citation hereby acknowledged to the same effect as if duly served by an officer this 23 day of Jan., A. D. 1904.

F. M. WOODS &
F. M. McHALE,
By F. M. WOODS,
Attorneys for Lucretia L. Green, William E. Green, Effie Green, Lina Hill, Fannie E. McHale, and Lottie De Wit, Defendants in Error.

[Endorsed:] No. 13,005 In the supreme court of the State of Kansas R. R. Dunbar *et al.* pl'ffs in error *vs.* Lucretia L. Green *et al.* def'ts in error Citation. Filed Jan. 25 1904 D. A. Valentine clerk supreme court.

And afterwards on the 26th. day of January A. D. 1904, there was filed in the office of the clerk of the supreme court of the State of Kansas, a writ of error, which with the allowance thereof and the endorsements thereon, is in words and figures as follows, to-wit:—

In the Supreme Court of the State of Kansas.

R. R. DUNBAR, ELIZABETH DUNBAR, GEORGE WASHINGTON, Allen F. Reed, Al. Payne, T. H. Payne, John Small, and George Dunbar, Plaintiffs in Error,
vs.
LUCRETIA L. GREEN, WILLIAM E. GREEN, EFFIE Green, Lina Hill, Fannie E. McHale, and Lottie De Wit, Defendants in Error.
} No. 13005.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the supreme judicial court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme judicial court of the State of Kansas, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between R. R. Dunbar, Elizabeth Dunbar, George Washington, Allen F. Reed, Al. Payne, T. H. Payne, John Small and George Dunbar, plaintiffs in error, and Lucretia L. Green, William E. Green, Effie Green, Lina Hill, Fannie E. McHale and Lottie De Wit, defendants in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, — commission held under the United States, and the decision was against the title, right, privilege, and exemption specially set up or claimed under such claim of said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of said R. R. Dunbar, Elizabeth Dunbar, George Washington, Allen F. Reed, Al. Payne, T. H. Payne, John Small and George Dunbar, as by their complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on a day not exceeding thirty days from the 22 day of January, 1904, in the office of the clerk of the said Supreme Court, that the record and proceedings aforesaid being in-

spected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 25 day of January in the year of our Lord one thousand and nine hundred and four.

{ The Seal of the Circuit Court of the United States, District of Kansas, 1862. }

GEO. F. SHARITT,
Clerk of the Circuit Court of the United States for the District of Kansas.

Allowed January 22d 1904.

W. A. JOHNSTON,
Chief Justice Supreme Court Kansas.

[Endorsed:] No. 13,005 In the supreme court of the State of Kansas. R. R. Dunbar *et al.* plaintiffs in error *vs.* Lucretia L. Green *et al.* defendants in error Writ of error. Filed Jan. 26 1904 D. A. Valentine clerk supreme court. Original L. F. Bird & H. G. Pope att'ys for pl'ffs in error.

And also on the same day there was filed in the office of the clerk of the supreme court of the State of Kansas, an assignment of errors which assignment of errors with the endorsements thereon is in words and figures following to-wit:

In the Supreme Court of the United States, of October Term, in the Year of Our Lord One Thousand Nine Hundred and Four.

R. R. DUNBAR, ELIZABETH DUNBAR, GEORGE WASHINGTON, Allen F. Reed, Al. Payne, T. H. Payne, John Small, and George Dunbar, Plaintiffs in Error,
vs.
LUCRETIA L. GREEN, WILLIAM E. GREEN, EFFIE GREEN, Lina Hill, Fannie E. McHale, and Lottie De Wit, Defendants in Error. } No. —.

Assignments of Errors.

R. R. Dunbar, Elizabeth Dunbar, George Washington, Allen F. Reed, Al. Payne, T. H. Payne, John Small and George Dunbar, plaintiffs in error, in connection with their petition for a writ of error, say that in the record and proceedings in said cause there is manifest error in the particulars following, to-wit:

1. The supreme court of the State of Kansas erred in affirming the decision of the district court of Wyandotte county, Kansas, and in deciding in an action of ejectment in which the plaintiffs in error

were defendants and the defendants in error were plaintiffs, that the plaintiff in error, George Washington, was not the owner of, nor entitled to the possession of the property in controversy herein, being lots 18, 42, 43, 44, 45 and 47, in block 10; lots 10, 11, 12, 13, 27, 28, 29, 30, in block 8; lots 18, 19, 20, 23, 24, 25, 26, 35, 36 in block 11; lot 9 in block 12; lots 33, 34 in block 13; lots 19, 20 in block 16; lots 20, 21 in block 19; lot 1 in block 7, in Argentine Heights, an addition to the city of Argentine, in Wyandotte county, Kansas, and being part of the northwest quarter of section 29, township 11, range 25, in said Wyandotte county, Kansas, and which was granted on December 28, 1859, by patent from the United States of America to Susan Whitefeather, as the head of a family consisting of herself and said George Washington, her son, members of the Shawnee tribe of Indians, under the provisions of the second and ninth articles of the treaty of May 10, 1854, between the Government of the United States and the Shawnee tribe of Indians and section 11 of the act of Congress of March 3, 1859, and with the stipulation prescribed by the Secretary of the Interior under said act of Congress of March 3, 1859, that the said land should never be sold or conveyed by the said grantor, or her heirs, without the consent of the Secretary of the Interior for the time being, and which said George Washington inherited as the sole heir of said Susan Whitefeather who died before July 10, 1862, but that the same was vested in the defendants in said suit, defendants in error herein, being derived by them through mesne conveyances from Joel F. Kinney, grantee of a guardian's deed of date October 14, 1868, from Jonathan Gore, guardian of George Washington, a minor, to said Joel F. Kinney, appointed as such by the probate court of Johnson county, Kansas, and approved by the Secretary of the Interior on May 21, 1869, and which guardian's deed was admitted to be a void deed, the said supreme court of Kansas deciding that the title of said George Washington was barred by laches and estoppel, and by the statute of limitations of the State of Kansas, although said George Washington was at all times and at the time of the trial a member of the Shawnee tribe of Indians, and was on September 26, 1900, duly made a citizen of the United States in and by the circuit court of the United States for the northern district, Indian Territory, at Vinita, and said Shawnee tribe existed as a tribe, and was so recognized by the political department of the Government of the United States from the time of the issuing of said patent to Susan Whitefeather to the time of the trial of the case, and although the property in controversy had remained vacant and unimproved until possession was taken of the same for George Washington on June 25, 1895.

2. The supreme court of the State of Kansas erred in deciding that the rights and title of George Washington, a Shawnee Indian living with his tribe, and recognized as such by the proper officers of the Government, to the land in controversy, which he inherited from his mother, Susan Whitefeather, to whom it was granted by

patent from the United States of America, under the provisions of the second and ninth articles of the treaty of May 10, 1854, between the Government of the United States and the Shawnee tribe of Indians, could be lost by his laches, and that the statute of limitations of the State of Kansas would run against him and against his rights and title to said land and that he could be estopped by receiving some money from the proceeds of a sale of said property by a guardian appointed for George Washington by the probate court of Johnson county, Kansas.

3. The supreme court of the State of Kansas erred in deciding that the rights and title of George Washington to the property in controversy could be sold and conveyed by Jonathan Gore, who was appointed guardian by the probate court of Johnson county, State of Kansas, and that said land, and George Washington, the owner, was not exempt from the jurisdiction and control of the laws of the State of Kansas, by the treaties between the Government of the United States and the Shawnee tribe of Indians of date August 8, 1831, articles 2, 9 and 10, and of May 10, 1854, articles 1, 9 and 14, and the act of Congress of January 29, 1861, admitting the State of Kansas into the Union.

4. The supreme court of the State of Kansas erred in deciding that George Washington a tribal Shawnee Indian, and recognized as such by the proper officers of the Government of the United States could be guilty of laches, and be estopped by his conduct, and barred of his interest in land under the treaty of May 10, 1854, between the Government of the United States and the Shawnee tribe of Indians.

5. The supreme court of the State of Kansas erred in deciding that George Washington a tribal Shawnee Indian was guilty of laches because for 21 years he neglected to bring his present action for the possession of the land in controversy, when said land was at all times during said 21 years vacant and unoccupied land and the only possession ever taken of the same was for said George Washington.

And the said R. R. Dunbar, Elizabeth Dunbar, George Washington, Allen F. Reed, Al. Payne, T. H. Payne, John Small and George Dunbar, plaintiffs in error, pray that said judgment of the supreme court of the State of Kansas, may be reversed, annulled, and altogether held for naught, and that the plaintiff in error be restored to all things which he hath lost by occasion of said judgment, and for costs of suit.

L. F. BIRD AND
H. G. POPE,
Attorneys for Plaintiff in Error.

[Endorsed:] No. 13005. In the supreme court of the State of Kansas. R. R. Dunbar *et al.* plaintiffs in error *vs.* Lucretia L. Green *et al.* defendants in error. Assignments of error. Filed Jan. 26 1904. D. A. Valentine clerk supreme court. L. F. Bird & H. G. Pope attorneys for pl'ffs in error.

In the Supreme Court of the State of Kansas.

R. R. DUNBAR, ELIZABETH DUNBAR, GEORGE WASHington, Allen F. Reed, Al. Payne, T. H. Payne, John Small, and George Dunbar, Plaintiffs in Error,
vs.
LUCRETIA L. GREEN, WILLIAM E. GREEN, EFFIE GREEN, Lina Hill, Fannie E. McHale, and Lottie De Wit, Defendants in Error.
} No. 13005.

I, D. A. Valentine, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, true, correct and complete transcript of all the pleadings and papers filed and all proceedings had in the above entitled cause, as the same now remain on file and of record in my office.

Witness my hand and the seal of the supreme court of the State of Kansas, hereto affixed at my office in Topeka, this 26th. day of January A. D. 1904.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

UNITED STATES OF AMERICA, Supreme Court of Kansas, } ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all thing- concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said supreme court, in the city of Topeka, this 26th. day of April A. D. 1904.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

Plaintiff's costs $11.40, unpaid.
Costs of transcript $3.50, paid by plaintiff.

D. A. VALENTINE,
Clerk Supreme Court of Kansas.